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OFFICE OF THE ATTORNEY GENERAL

CHARLES A. GRADDICK
ATTORNEY GENERAL
STATE OF ALABAMA

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ADMINISTRATIVE BUILDING
64 NORTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205) 834-5150

JAMES R. SOLOMON, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM M. BEKURS, JR.
EXECUTIVE ASSISTANT

WALTER S. TURNER
CHIEF ASSISTANT ATTORNEY GENERAL

JANIE NOBLES
ADMINISTRATIVE ASSISTANT

Honorable Allen L. Tapley
Administrative Director of Courts
Administrative Office of Courts
817 So. Court Street
Montgomery, Alabama 36130

Courts - Clerks - Registers -
Supernumerary Status

Clerk or register need not, in general, be in office upon reaching age to be supernumerary, except when disabled or over 70 under Sections 12-17-140(a)(1) and (4).

Dear Mr. Tapley:

You have requested an opinion of this office respecting the following question:

Whether a person filing a written declaration pursuant to §12-17-140 must be in office:

(1) At the time he reaches the requisite age under §12-17-140(a)(2), (3) and (4), assuming the prerequisite service requirements have been met, or (2) At the time he is disabled as provided in §12-17-140(a)(1).

The pertinent portion of §12-17-140, Code of Alabama 1975, read as follows:

"(a) Any clerk or register of the circuit court, serving on October 1, 1976, or clerk elected or appointed in any county of the state of Alabama:

"(1) Who has served as much as five years as a circuit clerk or register and who has become permanently, physically or mentally unable to carry out the duties of the office on a full-time basis, proof of such disability being made by a certificate of three reputable physicians;

"(2) Who has served for 12 years as a circuit clerk or register and has reached or passed the age of 65 years;

"(3) Who has served for 15 years as circuit clerk or register and who is not less than 62 years of age; or who has served as such for more than 15 years and has attained the age of 62, less one year for each year of service in excess of 15;

"(4) Who has served continuously for 10 years as circuit clerk or register and who is not less than 70 years of age; or

"(5) Who has served for not less than 18 years or three full terms as a circuit clerk or register;

may elect to become a supernumerary clerk of the circuit court or supernumerary register of the circuit court of the county in which said clerk or register has served as such official by filing a written declaration to that effect with the administrative director of courts at least 30 days prior to the time said clerk or register desires to become a supernumerary official. ..."

This office has previously held that a person must be 55 years old, or older, to qualify for supernumerary status. Opinion of the Attorney General to the Hon. Glenn Murphy dated Sept. 7, 1977, file number 345. A cursory examination of the statute reveals that this 55-year age requirement

applies only in those situations described in subsections (1) (permanently disabled) and (5) (service of 18 years or three full terms) and possibly the second clause of subsection (3) (more than 15 years service and age 62 less one year for each year of service over 15, with more than 22 years of service).

In the case of a person who has served in one of the offices in question (clerk or register, hereafter referred to as clerk) for the requisite period of time (at least 12 years) under subsections (2), (3), and (5), it is clear that, although he may leave the office, he has contributed to the fund pursuant to §12-17-143 (unless he elected to notify the administrator of courts of his desire not to participate pursuant to §12-17-145). He may, under the terms of §12-17-147 withdraw from the supernumerary fund and have refunded his contributions and the interest thereon if his service is terminated prior to the time he is entitled to be commissioned a supernumerary. Accordingly, his status becomes vested upon serving the requisite minimum years, that is, 12 years, and he is entitled to be commissioned, after attaining the specified age, at least 55, upon filing the required written declaration.

A person coming under the provisions of subsection (4) must be treated differently for this reason: the legislature described the requisite service as "continuously for 10 years..." (emphasis supplied) whereas in subsections (2) and (3) the service is described as for a specified period of years. The legislature is presumed to have intended some distinction where it uses different words in a statute. Thus, it is necessary to give meaning to the use of the word "continuously" in subsection (4) and, logically, this implies that the clerk in question attained the age of seventy while serving for at least 10 years in the office. Accordingly, it is the opinion of this office that a clerk who attains the age of 70 while serving, and who serves 10 years in the office of clerk, is entitled to be commissioned as a supernumerary clerk upon filing the required written declaration.

In the case of a person who has served five years, or more, and who becomes disabled while so serving, there is no doubt that his status becomes vested, and he is entitled to a commission as a supernumerary upon attaining 55 years of age. However, a person who serves 5 years, but less than 12 years

(10 years in the case of a person who becomes 70 years of age while serving), and then leaves office, and subsequently to leaving office, becomes disabled, has no vested status. He is "unable to carry out the duties of the office on a full-time basis" not because of his disability but because he does not hold the office.

To summarize, it is the opinion of this office that:

(1) Under §12-17-140(a)(1) a person who has served 5 years or more and is disabled while in office is entitled to be commissioned a supernumerary clerk upon attaining 55 years of age;

(2) Under §12-17-140(a)(2) and (3) a person who has served the specified years is entitled to be commissioned a supernumerary clerk upon attaining the specified age, but need not be in office upon attaining that age;

(3) Under §12-17-140(a)(4) a person who becomes 70 years of age while in office, and who has served 10 years, is entitled to be commissioned a supernumerary clerk; and


(4) Under §12-17-140(a)(5) a person who serves 3 full terms (18 years) is entitled to be commissioned a supernumerary clerk upon attaining 55 years of age, but need not be in office upon attaining that age.

I trust the foregoing answers your questions. If this office can be of further service to you, please let us know.

Yours very truly,

CHARLES A. GRADDICK
Attorney General

By-



PHILIP C. DAVIS
Assistant Attorney General

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